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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

STEVIE LAMAR FIELDS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court recognized that when "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred[,]" absent a showing of cause and prejudice or a miscarriage of justice. Id. at 750. An independent and adequate state procedural rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991).

1. Did the Ninth Circuit err (1) by using the date of Fields's state appeal, rather than the date the state court applied its rule, as the trigger date for its analysis of whether the rule was regularly followed and (2) by finding California's longstanding and commonplace procedural rule that habeas corpus is not a substitute for appeal (the "Dixon" rule) inadequate to bar federal review?

2. Are state procedural rules improperly subject to a more stringent standard on federal habeas corpus than that applied to federal procedural rules in federal court?

3. May a federal habeas corpus court deem a state procedural rule inadequate to preclude habeas corpus review, absent a showing by the petitioner that he was denied a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being in his way by the state?

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All parties appear in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

ARTHUR CALDERON, Warden, *Petitioner*,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Calderon, Warden ("the Warden") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 125 F.3d 757 (9th Cir. 1997).

The opinion of the United States District Court appears at Appendix B to the petition and is unreported.

JURISDICTION

The United States Court of Appeals decided this case on September 10, 1997. A timely petition for rehearing was denied by the United States Court of Appeals on October 29, 1997. Copies of the orders denying rehearing and staying the mandate appear at

Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Former 28 U.S.C. § 2254 (reprinted in Appendix E)

STATEMENT OF THE CASE

On July 6, 1979, a Los Angeles County Superior Court jury found respondent Stevie Lamar Fields ("Fields") guilty as charged in a 14-count information with one count of robbery-murder, plus various counts of robbery, kidnap for robbery, forcible oral copulation, rape, assault with a deadly weapon and kidnap, with personal handgun use in 10 counts. The parties stipulated that Fields had been convicted of voluntary manslaughter in 1976.

On July 12, 1979, after a sanity hearing, the jury found Fields legally sane at the time of his offenses. On July 17, 1979, at the conclusion of the penalty phase, the jury returned a verdict of death. The trial court sentenced Fields to death.

The conviction was affirmed by the California Supreme Court on direct review in 1983. People v. Fields, 35 Cal. 3d 329, 197 Cal. Rptr. 803, 673 P.2d 680 (1983), cert den. Fields v. California, 469 U.S. 892 (1984).

In 1984, Fields filed a petition for writ of habeas corpus in the California Supreme Court. In 1985, Fields filed an amended petition. In December of 1990, the California Supreme Court denied the petition for writ of habeas corpus. In re Fields, 51 Cal. 3d 1063, 275 Cal. Rptr. 384, 800 P.2d 862 (1990), cert den. Fields v. California, 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a habeas corpus petition in the United States District Court, which had jurisdiction of the proceeding under 28 U.S.C. §2254.

On July 29, 1993, the California Supreme Court decided In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), and In re Harris, 5 Cal. 4th 813, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993), which clarified (and strengthened) existing California procedural default law. Clark at 756; Harris at 829.

On August 2, 1993, Fields filed an amended federal petition. In its order of October 20, 1993, the district court found that a number of Fields's claims were unexhausted and ruled that the federal proceedings would be held in abeyance so that Fields could return to state court to exhaust his remedies or, in the alternative, file an amended federal petition containing only exhausted claims.

On January 14, 1994, Fields filed a second state petition, which contained virtually all of the claims he had presented to the federal court, plus one claim not presented in the federal petition. On October 14, 1994, the California Supreme Court denied the state petition for writ of habeas corpus. Citing In re Harris, 5 Cal. 4th at 829, and In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), the California court denied 11 claims in whole or in part "on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition." App. C.

Fields filed a petition for writ of certiorari from the denial of the last state habeas corpus petition on January 12, 1995. His petition was denied on March 20, 1995. Fields v. California, 115 S. Ct. 1369, 131 L. Ed. 225 (1995).

Fields returned to the United States District Court with his second amended petition for writ of habeas corpus on March 21, 1995. On July 31, 1995, the Warden filed a motion to dismiss on grounds of procedural default the 11 claims denied by the California Supreme Court as untimely because they could have been, but were not, raised in Fields's appeal or first state habeas corpus petition. Fields opposed the motion. After a hearing on the motion, the United States District Court found California's Dixon rule independent of federal law and adequate to support the judgment, in that it was firmly established both at the time of Fields's direct appeal in 1981 and at the time when he filed his second state

habeas corpus petition in 1994. Accordingly, the court granted the Warden's motion and dismissed all of the claims as to which the Warden had asserted procedural bar. On July 30, 1996, the district court denied Fields's motion for reconsideration and granted his request to take an interlocutory appeal of the dismissal order.

Fields appealed to the United States Court of Appeals for the Ninth Circuit, which properly assumed jurisdiction pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure. In a published decision filed on September 10, 1997, the Ninth Circuit vacated the judgment of the United States District Court, holding that the adequacy of California's Dixon rule should have been measured as of 1981, the year of Fields's direct appeal, rather than at any subsequent time, such as the date when the Supreme Court invoked the bar. Fields v. Calderon, 125 F.3d 757, 761 (9th Cir. 1997). The Ninth Circuit panel found that because the state's application of its Dixon rule had been inconsistent in 1981, Fields was deprived of notice. Id.

Since Fields had not attempted to show inconsistency by providing a survey of California cases, the court independently undertook to do so. Id. at 761, 764-65. Without explanation of its methodology, the court selected a nine-year period from 1973 through 1981. Id. at 764. It found that nine published cases had alluded to the Dixon rule. Of those nine cases, five had been decided by the California Court of Appeal, and only four by the California Supreme Court. Id. at 764 & 764 n.7. Fields, as a death penalty defendant, had never been, and would never be, subject to the jurisdiction of the Court of Appeal, and the Court of Appeal is not the court of last resort in California. Nonetheless, the Ninth Circuit panel treated the five Court of Appeal decisions with a dignity equal to that afforded the four cases decided by the California Supreme Court. Id. at 764-65. Relying most heavily on two California Court of Appeal cases, the Ninth

Circuit found that the Dixon rule had not been consistently applied by the state courts in 1973 through 1981. Id.

On October 7, 1997, the Court of Appeals denied the Warden's petition for rehearing but did not properly enter the order. On October 29, 1997, in response to the Warden's motion, the panel entered an amended rehearing denial order and granted the Warden a 30-day stay of the mandate. The stay was extended another 30 days on November 28, 1997. On December 29, 1997, the Warden applied for a second extension of the stay of the mandate. The Ninth Circuit granted the Warden's request, extending the stay of the mandate to and including January 27, 1998.

REASONS FOR GRANTING THE WRIT

WITHOUT PROMPT AND FIRM INTERVENTION BY THIS COURT, CALIFORNIA'S PROCEDURAL DEFAULT RULES WILL CONTINUE TO BE SET AT NAUGHT BY THE NINTH CIRCUIT

This Court has firmly held that federal courts are barred from reviewing on habeas corpus a state prisoner's federal claims if he has defaulted them in state court under an independent and adequate state rule of procedure.[1] Coleman v. Thompson, 501 U.S. 722, 751

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1. A state procedural rule must be both independent of federal law and adequate to bar federal review. Ford v. Georgia, 498 U.S. 411, 424 (1991). In this case, the Ninth Circuit panel expressly declined to address Fields's claim that the Dixon rule is dependent on federal law, so the rule's independence is not currently at issue. Fields, 125 F.3d 757, 760. The independence of this sort of state rule is not generally at issue. See, e.g., Murray v. Carrier, 477 U.S. 478,

(1991). A state procedural rule is adequate if it is "'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991). This message has not reached the Ninth Circuit.

Continuing its systematic dismantling of California's procedural defaults as bars to federal collateral review, the Ninth Circuit has now held California's "Dixon" bar inadequate. Fields v. Calderon, 125 F.3d 757, 765. In this most recent example, the court turned its attention to a longstanding, commonplace procedural rule, which provides that an issue that could have been raised on direct appeal, but was not, cannot be raised later on state habeas. In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513, 514-15 (1953).

The Ninth Circuit's disinclination to honor California's procedural bars has been amply demonstrated over the past few years by a series of cases in which the federal reviewing court repeatedly found various California rules, as measured by varying and inconsistent trigger dates, were "pre-In re Clark," and therefore inadequate to bar federal review. For example, in Siripongs v. Calderon, the Ninth Circuit measured adequacy from the date of the petitioner's final state-court habeas corpus denial in 1991, which predated the 1993 Clark and Harris decisions. It found California's application of the rule inconsistent in 1991 and held the state's successive-petition default inadequate to bar federal review of Siripongs's claims. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

In Morales v. Calderon, as it had done in Siripongs, the Ninth Circuit measured the independence and adequacy of California's timeliness rule as of the date of the California Supreme Court rejection of the claim on procedural grounds. Morales v. Calderon, 85 F.3d 1387,

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482-83 (1986); Deere v. Calderon, 890 F. Supp. 893, 896, 901 (C.D.Cal. 1995) (Dixon rule).

1388, 1392-93 (9th Cir. 1996). In Morales, the date of that denial order was July 28, 1993, the day before the Supreme Court filed Clark and Harris. Morales, 85 F.3d at 1391, 1393. After finding that the state enforced the rule inconsistently as of July 28, 1993, the Ninth Circuit held that the state rule was inadequate to bar federal review. Id.

By 1996, when the Ninth Circuit decided Calderon v. United States District Court for the Eastern District of California (Bean), the ground rules had changed. The Bean court assessed the consistency of the state's timeliness bar at the time of Bean's initial default -- his direct appeal -- even though the state court did not apply the procedural rule until 1995, well after the California court's 1993 decisions in Clark and Harris. Bean, 96 F.3d 1126, 1128, 1130-31 (9th Cir. 1996).

Later that year the Ninth Circuit found California's timeliness and Dixon rules inadequate, premising its finding on an evaluation of the consistency with which the state followed those rules as of 1987, when Hayes filed his first state habeas petition, rather than 1994, when the California Supreme Court invoked the bar against Hayes. Calderon v. U.S. Dist. Ct. for E.D. of California (Hayes), 103 F.3d 72, 75 (9th Cir. 1996).

And now that court, following Bean but inexplicably ignoring Siripongs, Morales and even Hayes, has determined in Fields that the trigger-date for its consistency analysis is the defendant's direct appeal. Fields v. Calderon, 125 F.3d at 765. Without prompt and firm intervention by this Court, California's legitimate efforts to protect its judgments from the unwarranted interference of the lower federal courts are futile.

The Ninth Circuit's hostility to California's procedural bars stands in stark contrast to this Court's traditional respect for such bars. As recently as its decision in Lambrix v. Singletary, this Court reemphasized:

> A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.

Lambrix, ___ U.S. ___, 117 S. Ct. 1517, 1522-23, 137 L. Ed. 2d 771 (1997). The Ninth Circuit has not heeded this admonition.

As this Court has pointed out time and again in recent years, the principle of procedural default is not an arid technicality. It is a fundamental element of the doctrine of the federal system, based on the recognition that federal relief has the effect of nullifying independent state rules. It is designed to ensure that state courts have an opportunity to address federal claims in the first instance by precluding a defendant from taking his claims straight to federal court. It vindicates a state's basic interest in the finality of its judgments, and protects them from stale and meritless claims filed years, or even decades, after conviction. Coleman v. Thompson, 501 U.S. at 729-32; Harris v. Reed, 489 U.S. 255, 262 (1989); Michigan v. Long, 463 U.S. 1032, 1040 (1983); Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977).

In Coleman, this Court held:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice .... We now recognize the important interest in finality served by state procedural rules, and the significant

> harm to the States that results from the failure of federal courts to respect them.

Coleman at 729. The decision in Coleman rests on enduring principles limiting federal habeas corpus jurisdiction. Francis v. Henderson, 425 U.S. 536, 542 (1976) ("no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants"); Brown v. Allen, 344 U.S. 443, 485-87 (1953) (state procedural default for notice of appeal, filed one day late, found virtually identical to federal rule and held independent and adequate to bar federal review); Ex parte Spencer, 228 U.S. 652, 659-60, 663 (1913) (state prisoner barred from raising ex post facto issue on habeas because "the writ of habeas corpus is not to be used as a writ of error"). More than 50 years ago, in Yakus v. United States, 321 U.S. 414, 444 (1944), this Court explained:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Id.; accord, United States v. Olano, 507 U.S. 525, 531 (1993).

Recently, this Court has spoken even more plainly on this point, while also reminding federal habeas courts of the importance of treating state procedural defaults with the same deference they apply to their own default rules: "We see no reason to afford habeas review to a state prisoner . . . who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated." Reed v. Farley, 512 U.S. 339, 129 L. Ed. 2d 277, 292 (1994); Francis v. Henderson, 425 U.S. at 542.

The Warden, in accordance with this Court's jurisprudence, has consistently asserted a few long-

standing, well-established, easily-understood procedural bars in the Ninth Circuit, almost always to no avail. Until this Court intercedes to rectify the Ninth Circuit's mischief, that court will continue to effectively decimate California's system of procedural-default rules, thereby depriving California of the legitimate expectation of finality of its judgments.[2]

Procedural default has become a battleground in the Ninth Circuit, especially in capital cases. This Court has phrased its standards and rules at a reasonable and understandable level of abstraction, anticipating that the lower courts would apply those rules with appropriate concern for comity. In the Warden's view, that has not happened in the Ninth Circuit.

This case is a prime example of the harm that can be done to state-court procedural rules when federal-court oversight is grudging and suspicious, rather than deferential and respectful. This case also illustrates, in concrete terms, the practical harm that stems from a federal court's erroneous repudiation of state procedural bars. The facts on which Fields's allegations rest are now two decades old, and the state's ability to defend has been severely prejudiced. The Ninth Circuit gave no apparent consideration to this legitimate state interest.

Indeed, the Ninth Circuit went out of its way to reach its result. When Fields himself did not make a district-court record on the issue of inconsistent application of the state's Dixon rule, the Ninth Circuit

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2. This Court has denied petitions for writs of certiorari in Calderon v. United States District Court (Hayes), 103 F.3d 72, 94, cert. denied 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (1997); Calderon v. United States District Court (Bean), 96 F.3d 1126, 1194, cert. denied 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), cert. denied 117 S. Ct. 500, 136 L. Ed. 2d 391 (1996); Siripongs v. Calderon, 35 F.3d 1308, cert. denied 513 U.S. 1183 (1995).

panel did it for him. The panel went outside the record, conducting its own sua sponte survey of California's Dixon-bar cases, without notice to, or briefing by, the parties. Without explanation or analysis, the panel held that the Dixon rule's adequacy -- not only whether the rule was firmly established, but also whether it was consistently applied -- was to be evaluated as of the date of Fields's appeal in 1981, rather than in 1994, the date when the rule was invoked. In addition, although the Dixon rule had been in existence for decades by 1981, the panel inexplicably limited its case-law survey of the rule to nine published cases decided during the nine-year period immediately preceding Fields's appeal, and it improperly considered five Court of Appeal cases, even though Fields, a death penalty inmate, was never subject to the Court of Appeal's jurisdiction, and the Court of Appeal was not the court of last resort in California. Some of these cases, moreover, involved aspects of the Dixon rule quite different from that invoked by the state supreme court in the Fields case. The panel's ultimate findings of inconsistency and inadequacy were understandably colored by its failure to give the Warden notice or an opportunity to address the evidence and findings it asserted in its survey until he filed his rehearing petition.

Given the Ninth Circuit's unfriendliness to California's procedural bars, those rules are all at risk of being rendered useless to preclude federal review. The Warden urges this Court to grant certiorari in this case, not only to correct the particular errors made here, but also to signal its determination to vindicate the important comity and finality concerns which have been central to the reform of federal habeas corpus over the past quarter century. Those reforms have not taken hold in the Ninth Circuit. Without prompt remedial action by this Court, procedural default will be a dead letter in California.

I.

In Assessing the Regularity of the California Supreme Court's Application of its Dixon Rule, the Ninth Circuit Should Have Measured From the Date of the State Court's Action in Denying Fields' Final Habeas Petition

The Ninth Circuit panel found that the Dixon rule was not regularly followed by the state courts in 1981, the year Fields filed his opening brief on appeal. Patently confusing firm establishment with regularity of application, the panel erroneously concluded that California's allegedly irregular application deprived Fields of notice. Fields, 125 F.3d at 761.

A state procedural rule is adequate to bar federal review if it is "'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991); James v. Kentucky, 466 U.S. 341, 348-49 (1984). The "firmly established" element of adequacy is a notice requirement: "a petitioner must have been apprised of the rule's existence at the relevant time." Deere v. Calderon, 890 F. Supp. 893, 897 (C.D.Cal. 1995).

Fields had abundant notice of the Dixon rule at the time of his appeal in 1981. In re Dixon had been decided in 1953, nearly three decades earlier. Dixon itself was nothing new. It had relied on earlier cases and merely restated a rule that was well established even in 1953. Dixon, 41 Cal. 2d at 759. Fields knew at the time of his appeal that California's rule dictated that he raise all of his of-record claims in his direct appeal. He could have taken the prudent course of raising those contentions on appeal, but he apparently chose instead to risk holding back some of his of-record claims so they could be raised later. This tactical election was not forced on him, nor

was he gulled into believing he could safely wait until some unspecified time in the future. The necessity of making a series of tactical choices, each of which has consequences, is hardly unique to Fields or, indeed, to any defendant.

In 1994, the California Supreme Court found that Fields had violated its established procedural rule by raising claims in his 1994 habeas petition which he could and should have brought in 1981 on direct appeal. A Ninth Circuit panel has now rewarded Fields for holding back claims for 13 years, and in doing so has undermined the State's legitimate interest in enforcing its reasonable procedural rules to achieve finality of its criminal judgments. The panel was wrong to ignore the fact that Dixon had been firmly established at least since 1953, and that it provided Fields with sufficient notice of the rule in 1981.

The Ninth Circuit erred as well in assessing the "regularity" of the rule's application as of 1981. The Warden submits that the proper trigger date for a consistency-of-application evaluation is 1994, the date when the California Supreme Court actually applied the Dixon rule and denied 11 claims contained in Fields's final state habeas corpus petition on procedural grounds. In the language of this Court's decision in Ford v. Georgia, "an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford, 498 U.S. at 424, emphasis added. The language emphasized in Ford is prospective, not retrospective. It must therefore refer to the time when the bar is invoked to defeat the petitioner's final petition, here 1994.[3]

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3. Of course, this analysis presupposes, as is true in this case, that the rule was firmly established, that is to say, that petitioner was on notice of the rule in 1981, at the time when he committed the

As previously discussed, earlier Ninth Circuit cases assumed the trigger to be the date of the California Supreme Court's ultimate procedural denial. Morales v. Calderon, 85 F.3d at 1388, 1392-93 (independence and adequacy of procedural rule measured as of date of California Supreme Court decision in which claim is rejected on grounds of procedural bar because filed one day before Clark and Harris); Siripongs v. Calderon, 35 F.3d at 1318 (similar). As the state-court denial dates became more recent, moving beyond the California Supreme Court's decisions in Clark and Harris, and the application of the rule became presumptively adequate, the Ninth Circuit sought trigger events farther back into the past. Hayes, 103 F.3d at 75 (critical date to judge default was 1987, when Hayes filed his first state habeas petition and failed to raise all claims); Bean, 96 F.3d at 1131 (trigger date for consistency analysis held to be date when Bean filed his direct appeal).

Because the federal court is evaluating the propriety of the state court's action of denying the writ on procedural grounds, the only logical trigger is the date when the state court invoked its procedural rule, not the date of the petitioner's earlier default.

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original default.

II.

The Ninth Circuit Erred by Subjecting California's Procedural Rules to a More Grudging and Suspicious Standard than it Applies to the Invocation of Federal Procedural Default Rules

A. The California Supreme Court Properly Clarified its Rules in 1993

The Ninth Circuit reached its conclusion that California's Dixon rule was inconsistently applied by placing great reliance on the California Supreme Court's declaration in the 1993 companion cases of In re Clark and In re Harris that California's longstanding habeas rules needed to be "reexamine[d]" and their purposes "reiterate[d]" (Harris, 5 Cal. 4th at 826). Fields, 125 F.3d at 762. The Fields panel seized upon the historical discussion of habeas practice contained in Clark, 5 Cal. 4th 750, and concluded that California's "application of its procedural rules had become irregular and inconsistent[,]" and the two cases "were intended to reestablish California's procedural rules governing state habeas petitions . . . ." Fields, 125 F.3d at 763. The panel found that the California Supreme Court had, in effect, confessed to irregularities of application. Id. The Ninth Circuit was wrong.

In Clark and Harris, the California Supreme Court was, at most, merely restating its longstanding default rules and making sure that the very limited exceptions were clearly understood. The California Supreme Court in Harris never admitted to any inconsistency in its own practices. On the contrary, it stated:

> This latter rule (that habeas corpus will not lie ordinarily as a substitute for an appeal or as a

> second appeal) is now firmly established and often repeated without much explication. (Citations.) As with many rules of law, multiple repetitions over time may tend to obscure the original purpose of the rule. (Citations.) With the large number of petitions for writs of habeas corpus filed in the courts of this state and the concomitant burden on the judiciary to evaluate the hundreds of petitions ultimately barred on procedural grounds, it is important to reexamine and reiterate the purpose of the Waltreus rule.[4/]

In re Harris, 5 Cal. 4th at 826.

In relying on the California high court's clarification to invalidate the rule, the Ninth Circuit has subjected California's interpretation of its procedural rules to a test far more stringent than is warranted, in derogation of the principles of comity and federalism. See, McCleskey v. Zant, 499 U.S. 467, 477 (1991). In fact, the "admissions" the Ninth Circuit found California to have made in Harris and Clark of a need for clarification of its own rules are virtually indistinguishable from this Court's acknowledgment in McCleskey.

In McCleskey, this Court prefaced its discussion of McCleskey's claim with a straightforward admission relating to its abuse-of-the-writ standard and a history of its practices:

> Much confusion exists, though, on the standard for determining when a petitioner abuses the writ. Although the standard is central to the proper determination of many federal habeas

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4. The procedural rule at issue in Harris was the so-called "Waltreus" rule (In re Waltreus, 62 Cal. 2d 218, 225 (1965)), which precludes a petitioner from raising in a habeas corpus petition an issue which was previously raised and rejected on appeal. However, the Harris court noted that much of its Waltreus discussion applied to the Dixon rule as well. Harris, 5 Cal. 4th at 825 n.3.

> corpus actions, we have had little occasion to define it. Indeed, there is truth to the observation that we have defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications. Today we give the subject our careful consideration.

McCleskey, 499 U.S. at 477, emphasis added. Justice Kennedy, writing for a six-member majority, followed those words with a meticulous and exhaustive history of this Court's practices in abuse-of-the-writ cases. Id.at 477-97. The abuse-of-the-writ default rule in McCleskey was one of long standing which this Court forthrightly acknowledged had not been rigorously enforced. That did not prevent this Court from announcing a policy of stricter enforcement. It did not even prevent this Court from applying that new policy to McCleskey himself, because this Court understood that by clarifying its own application policies, it had not denied McCleskey notice of its abuse-of-the-writ policies. McCleskey, 499 U.S. at 470, 477.

This elementary distinction has been lost on the Ninth Circuit. If McCleskey had been decided by a California court, its default finding would have been held inadequate to bar federal review. Fields, 125 F.3d at 762-63. That would have been wrong in McCleskey, and it is wrong in Fields.[5]

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5. In fact, the Ninth Circuit refused to apply McCleskey retroactively in Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), and was reversed per curiam by this Court, with a citation to McCleskey. Angelone v. Deutscher, 500 U.S. 901 (1991).

B. The Federal Courts Owe State Procedural Rules the Same Respect They Show Their Own Federal Procedural Rules

In Coleman v. Thompson, adverting to its own settled acceptance of the vital interest served by federal procedural bars, this Court plainly stated that the states' procedural bars were entitled to the same deference:

> We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own.

Coleman v. Thompson, 501 U.S. at 751; Francis v. Henderson, 425 U.S. at 541-42.

Not so in the Ninth Circuit.

In habeas corpus actions brought by federal prisoners, where its own judgments are at stake, the Ninth Circuit has taken a hard line:

> Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal. The Supreme Court has held that where a criminal defendant fails to make allegations of error at trial or on direct appeal he must demonstrate (cause and actual prejudice).

United States v. Dunham, 767 F.2d 1395, 1396 (9th Cir. 1985), citing United States v. Frady, 456 U.S. 152, 168 (1982), and Davis v. United States, 411 U.S. 233, 236-45 (1973); see also Abatino v. United States, 750 F.2d 1442, 1445 (where petitioners failed to object at trial and failed to raise of-record issue on direct appeal, they committed a double procedural default); Hammond v. United States, 408 F.2d 481, 483 (9th Cir. 1969) (§2255 may not be invoked to relitigate questions which were or should have been raised on direct appeal). As the Ninth Circuit wrote of a federal prisoner's habeas petition,

> If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error. (Citation.) "Once the defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted, especially when . . . he already has had a fair opportunity to present his federal claims to a federal forum." Id.at 164.

United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993).

When the Ninth Circuit turns it attention to California judgments, as demonstrated by that court's decisions in Siripongs, Morales, Bean, Hayes, and now Fields, the hard line is applied against the state courts themselves, not against defaulting petitioners. California has a well-established appellate process for the presentation of a defendant's claims, and its default rules are properly intended to serve as a finding that a conviction is fair and final. This Court should direct the Ninth Circuit to treat California's procedural Dixon rule with the same measure of respect it would accord its analog in a §2255 case.

Notwithstanding its apparently greater respect for federal defaults, the Ninth Circuit itself at times muddies the waters, leading to legitimate questions about its own consistency in interpreting its procedural rules. For example, in English v. United States, 42 F.3d 473 (9th Cir. 1994), the panel distinguished Frady, holding that the defendants' failure to raise an of-record claim in their direct appeals was not a default and considering the claim on the merits. English, 42 F.3d at 476; see also United States v. de la Fuente, 8 F.3d 1333, 1336 n.4 (9th Cir. 1993) (to similar effect, but nullifying default based on failure to object).

Without regard to the merits of English and de la Fuente, it is well established that an occasional act of grace in which a court excuses or disregards its own rule does not render the rule inadequate. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); Amos v. Scott, 61 F.3d 333, 342 (5th Cir. 1995). Thus, the Warden does not suggest that the decisions in English and de La Fuente nullify the procedural bars they disregard. Still, sauce for the goose is sauce for the gander. If federal procedural rules are considered consistent, even though some federal courts occasionally disregard or distinguish away those rules, the state-court rules should be treated with equal deference. This case presents this Court with an opportunity to prompt the Ninth Circuit to treat California's procedural rules with the same consideration and deference it reserves for its own rules.

III.

The Ninth Circuit Erred in Finding California's Dixon Rule Inadequate to Preclude Federal Habeas Review, Because Fields Failed to Prove he was Denied a Reasonable Opportunity to Raise his Federal Claims in State Court Without Unreasonable Obstacles Being Placed in his Way by The State

The purpose of the federal court's evaluating both notice ("firmly established") and consistency ("regularly followed") is to determine whether the defendant was given a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being placed in his way by the state authorities. Wright, Charles et al., 16B Federal Practice and Procedure §4027 at 392 (2nd ed. 1996), citing Davis v. Wechsler, 263 U.S. 22 (1923). A lack of consistency is significant because it may evidence the state court's discrimination against a petitioner's assertion of his federal rights. Johnson v. Mississippi, 486 U.S. 578, 587-89 (1988); Prihoda v. Mc Caughtry, 910 F.2d 1379, 1383 (7th Cir. 1990).

As the Fields panel tacitly acknowledged, Fields had the burden of presenting evidence of irregularity and inconsistency, but did not do so. McCleskey v. Zant, 499 U.S. at 494; Fields, 125 F.3d at 761, 764. Instead of holding this default against Fields, the panel launched a sua sponte survey of nine cases over a nine-year period from 1972 to 1981 to make the case for inconsistency. Ironically, but perhaps predictably, the Ninth Circuit's survey of California's Dixon bar was seriously flawed in a number of different ways.

First, the parties neither briefed nor argued the contents, methodology and conclusions of the court's

survey. Without the participation of the parties and the consequent adversarial testing, the Court made fundamental errors of fact and law. In addition, the court's survey was too broad, in that it considered five California Court of Appeal cases, which were irrelevant to the analysis, because Fields had never been, and never would be, subject to that court's jurisdiction, and the California Supreme Court was the court of last resort.

The court's survey was also too narrow, in that it limited itself arbitrarily to the nine-year period which preceded Fields's appeal. The panel did not explain why its survey should not have included all California Supreme Court decisions filed during the 28 years between the decision in Dixon and Fields's direct appeal defaults. The sample was also skewed because it incorrectly excluded thousands of non-published California Supreme Court habeas orders. It is well known that courts generally publish cases which break new ground or deviate from the norm. As a consequence, a "survey" which fails to account for routine non-published assertions of the procedural bar is without validity.[6]

In any event, an evaluation of consistency should be more than just a mechanical toting-up of state cases. This Court has at times articulated a highly deferential view of state courts, in which "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe (state) . . . laws correctly." Murdock v. City of Memphis, 87 U.S. 590, 626 (1875). Consistent with that view is this Court's decision in Davis v. Wechsler, in which it held that state courts had the right to erect procedural

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6. Although a thorough survey of this kind is likely to be a labor-intensive undertaking for the petitioner, the state should not be penalized by the federal court's considering only published decisions, which are almost definitionally deviations from the norm, to find there was no adherence to the procedural rule.

bars so long as they did not put unreasonable obstacles in the way of individuals attempting to assert federal rights. Davis, 263 U.S. at 24-25. Thus, the Court has honored the states' invocation of procedural rules so long as the rules have not been invoked with "pointless severity," NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964), or as "an arid ritual of meaningless form," Wright v. Georgia, 373 U.S. 284, 291 (1963), or in a "novel" fashion, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58.

On other occasions, notably on direct review of a state judgment when a federal right, especially a civil right, has been at issue, this Court has articulated different standards of adequacy. Those standards do not focus on whether the defendant was given a reasonable opportunity to litigate his federal claims in state court without unreasonable obstacles being placed in his way by the state but rather assume plenary review of the federal question because the state's invocation of its procedural rule is suspicious. Sullivan v. Little Hunting Park, 396 U.S. 229, 234 (1969) (where plaintiffs challenged a "whites-only" membership policy as discriminatory, the Virginia Supreme Court's procedural default rule did not bar federal review); Williams v. Georgia, 349 U.S. 375, 383 (1955) (where state's action in barring review of a claimed violation in its jury selection method of white tickets for whites and yellow tickets for blacks appeared to be an avoidance of the federal right to equal protection, the rule was inadequate to bar federal review of the substantive issue). Likewise, this Court found the state's bar inadequate where it appeared the rule might have been invoked for the first time in the case under consideration. Johnson v. Mississippi, 486 U.S. at 588.

Not surprisingly, different circuits view consistency differently. For example, in contrast to the Ninth Circuit's stingy analysis of consistency, the Seventh Circuit's is considerably more deferential:

> Searching for "regularity" in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural rules unless they are regularly disregarded (or seemingly have been manufactured for the occasion, as in Johnson). A state ground that is solidly established will be respected even though not "strictly" followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interests of federalism would be served by such a development.

Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990). Prihoda is in accord with this Court's decision not to reach the merits in Swaggart Ministries v. Cal. Bd. of Equalization, because the state's rule served a legitimate interest in requiring parties to exhaust administrative remedies, and the state's procedural rule was unambiguously applied. Id. at 493 U.S. 378, 397-98 (1990). Significantly, this Court found that Swaggart had "failed to substantiate any claim that the California courts in general apply this exception in an irregular, arbitrary, or inconsistent manner." Id. at 399.

If, as Professor Wright and this Court's decision in Davis v. Wechsler have suggested, the object of the exercise is to be certain that the defendant was given a reasonable opportunity to raise his federal claims in state court without unreasonable interference by the state, the Warden submits that a petitioner should bear the burden

of making a prima facie case of prejudicial inconsistency or discriminatory invocation of the rule.

In this case, Fields has never suggested that he was singled out for harsh treatment, let alone that the California Supreme Court discriminated against his assertion of his federal rights, as was true in Sullivan and Williams.

This Court should grant certiorari to establish the principle that the petitioner bears the burden of demonstrating the inadequacy of the state rule in the district court. To make his showing, he would need to make a prima facie case that he was not given a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being placed in his way by the state. To that end, petitioner could present evidence in this case that the state afforded him no notice of the rule at the time of the original default in 1981, or that it was invidiously applied when it was invoked against him in 1994. The trigger date, apportionment of the burden of proof and minimum proof necessary to show inadequacy of the state rule need to be definitively established, and that can be accomplished only by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 27, 1998.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 96-99014
D.C. No.
CV-92-00465-DT
OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
June 19, 1997—San Francisco, California

Filed September 10, 1997

Before: Harry Pregerson, Charles Wiggins, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals vacated a judgment of the district court. The court held that the California rule precluding state habeas relief when claimed errors could have been, but were not, raised on direct appeal does not provide an adequate state ground to bar federal review of claims defaulted in 1981.

In 1979, appellant Stevie Fields was convicted of murd and sentenced to death. In 1983, his conviction and senten were affirmed by the California Supreme Court on dire appeal. In 1984, he filed a state petition for a writ of habe corpus, which was denied in 1990. In May 1993, he filed federal petition for a writ of habeas corpus.

In July 1993, the California Supreme Court decided *In Harris*, 95 P.2d 391 (Cal. 1993) and *In re Clark*, 855 P.2d 7 (Cal. 1993).

The district court stayed the federal proceedings to allo Fields to exhaust his state remedies. In January 1984, Field filed a second petition for habeas corpus in the Californi Supreme Court. The Court denied the petition, on the groun of untimeliness, in that the claims could have been, but wer not raised on appeal or in the first habeas corpus petition.

In 1995, Fields filed an amended habeas petition in the di trict court. The court dismissed the claims on the ground procedural default.

[1] The *Dixon* rule, established by the California Suprem Court in 1953, provides that a writ of habeas corpus will n lie where the claimed errors could have been, but were n raised on a timely appeal from a judgment of conviction. the *Dixon* rule provides an adequate and independent sta ground for the California Supreme Court's decision. Field defaulted procedurally on the affected claims and could n raise them in federal court unless he showed cause and preju dice or a fundamental miscarriage of justice.

[2] The proper date on which the rule's adequacy was to b measured had to be determined. The State argued that the co rect trigger date was October 14, 1994, the date on which th California Supreme Court denied Fields's second state habea petition, when the procedural bar at issue was actuall applied. Fields argued that the trigger date was 1981, the tim

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of his direct appeal, when the defaulted claims should have been raised.

[3] A state's procedural rule used to bar consideration of a claim must have been firmly established and regularly followed by the time as of which it is to be applied. [4] The *Dixon* rule applies when the petitioner had an opportunity to raise the claims on direct appeal. In this case, that moment was 1981, the year of Fields's direct appeal.

[5] Under the adequate and independent state grounds doctrine, federal courts will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. [6] For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.

[7] *In re Harris* involved the application of the *Waltreus* rule, which generally prevents a habeas petitioner from raising a claim for habeas review that was previously heard and decided on direct appeal. The discussion in the case also applied to the *Dixon* rule. [8] The California Supreme Court engaged in a lengthy discussion of four exceptions to the two rules and explicitly acknowledged that its application of the rules had become obscured over the years by the development of a number of exceptions, requiring the court to provide needed guidance to the bench and bar.

[9] *In re Clark* involved the application of the procedural rules regarding the timeliness of habeas petitions and the doctrine of separate petitions, barring a petitioner from raising claims in a second habeas petition that could have been, but were not, raised in the first habeas petition. [10] The California Supreme Court clearly stated that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in *In re Clark* and *In re*

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Harris were intended to reestablish California's procedu rules governing state habeas petitions and clearly define a limit the applicable exceptions.

[11] The 1993 decisions, though instructive on the questi of the adequacy of the *Dixon* rules, did not answer the que tion of exactly *when* the *Dixon* rule and other rules h become irregular and inconsistently applied.

[12] A survey of the California cases decided in the ni years preceding and including Fields's appeal that address how the *Dixon* was being applied **[13]** demonstrated that co sideration of constitutional claims not raised on direct appe had become the norm, even in cases where the *Dixon* rule w clearly applicable.

[14] The 1993 decisions and the independent survey su port the conclusion that the *Dixon* rule was not an adequa state ground to bar federal review of Fields's default claims.

COUNSEL

David S. Olson, Carlsmith, Ball, Wichman, Case, & Ichik Los Angeles, California, for the petitioner-appellant.

Carol Federick Jorstad, Deputy Attorney General, Los Ang les, California, for the respondent-appellee.

OPINION

T.G. NELSON, Circuit Judge:

Stevie Lamar Fields ("Fields") appeals the district court order granting Warden Calderon's ("the State's") motion t

dismiss eleven claims contained in Fields' second amended federal petition for writ of habeas corpus because they were declared procedurally defaulted by the California Supreme Court. We have jurisdiction under 28 U.S.C. § 1292(b). We vacate and remand.

PROCEDURAL HISTORY

In 1979, Fields was convicted of murder and sentenced to death.[1] In 1983, his conviction and sentence were affirmed by the California Supreme Court on direct appeal. *People v. Fields*, 673 P.2d 680 (Cal. 1983), *cert. denied*, 469 U.S. 892 (1984).

In 1984, Fields filed a petition for writ of habeas corpus in the California Supreme Court. After a hearing on the issue of whether Fields' attorney provided ineffective assistance, the California Supreme Court denied the petition in 1990, holding that Fields suffered no prejudice from his attorney's alleged incompetence. *In re Fields*, 800 P.2d 862 (Cal. 1990), *cert. denied*, 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a federal petition for writ of habeas corpus in district court. On July 29, 1993, the California Supreme Court decided two cases that are critical to the resolution of this appeal: *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993).

On August 2, 1993, Fields filed an amended federal habeas petition. The State moved to dismiss the petition on the grounds of procedural default. Finding unexhausted claims, the district court stayed federal proceedings on October 20, 1993, in order to allow Fields an opportunity to exhaust his state claims.

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[1]The facts of the underlying crime can be found in *People v. Fields*, 673 P.2d 680 (Cal. 1983).

On January 14, 1994, Fields filed a second petition for w of habeas corpus in the California Supreme Court. The St moved for denial of the state petition on procedural groun On October 14, 1994, the California Supreme Court den Fields' second state habeas petition. In the portion relevant this appeal, the California Supreme Court ruled:

> The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition: the claims set forth in parts IX (A, B, E, F, G), X (B, C, F, G, H, I), XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXXI. (*In re Harris* (1993) 5 Cal.4th 813, 829; *In re Dixon* (1953) 41 Cal.2d 756, 759.)[2]

On March 20, 1995, the United States Supreme Court den certiorari. *Fields v. California*, 514 U.S. 1022 (1995).

On March 21, 1995, Fields filed a second amended hab petition in the district court. On July 31, 1995, the State fi a motion to dismiss the claims denied by the Califor Supreme Court's order due to procedural default. After hearing, the district court granted the motion on June 1996, and dismissed all of the claims to which the State h asserted a procedural bar. On July 30, 1996, the district co denied Fields' motion for reconsideration and granted motion for interlocutory appeal. On August 27, 1996, granted Fields permission to take an interlocutory appeal this dismissal order.

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[2]In Fields' federal petition, these claims are numbered VII (A, B, E G), VIII (B, C, F, G, H, I), XIII, XVI, XIX, XXI, XXII, XXIII, XX XXVIII, and XXIX respectively.

DISCUSSION

"The district court's dismissal of the petition for writ of habeas corpus on the ground of state procedural default involves an issue of law that we review *de novo*." *Morales v. Calderon*, 85 F.3d 1387, 1389 n.6 (9th Cir.), *cert. denied*, 117 S. Ct. 500 (1996). *See also Hunter v. Aispuro*, 982 F.2d 344, 346 (9th Cir. 1992).

[1] The issue for decision is whether the California Supreme Court's *Dixon* rule serves as an adequate and independent state ground for its denial of eleven claims in Fields' habeas petition. In *Dixon*, the California Supreme Court held:

> The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

Ex parte Dixon, 264 P.2d 513, 514-15 (Cal. 1953) (In Bank) (citations omitted). If the *Dixon* rule provides an adequate and independent state ground for the California Supreme Court's decision, Fields "has defaulted procedurally on the affected claims and cannot raise them in federal court unless he shows cause and prejudice or a fundamental miscarriage of justice." *Morales*, 85 F.3d at 1389 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Because we conclude that the *Dixon* rule is not an adequate state ground to bar federal review of Fields' defaulted claims, we will not address Fields' alternative argument that the *Dixon* rule is not an independent state ground sufficient to bar federal review.[3]

[3]We further decline to address Fields' argument that the California Supreme Court's order on October 14, 1994, denying his second state habeas petition, is ambiguous. We assume, for purposes of this opinion, that the order is not ambiguous.

A. *The Trigger Date*

[2] Before addressing the adequacy of the *Dixon* rule, w must first determine the proper date on which the rule's ad quacy is to be measured. The district court ruled that "[t]h *Dixon* rule was firmly established both at the time petitione filed his second habeas petition [January 14, 1994] and at th time of his direct appeal [1981]." The State argues that th correct trigger date is October 14, 1994, the date on which th California Supreme Court denied Fields' second state habea petition where the procedural bar at issue was actuall applied. Fields argues that the correct trigger date is 1981, th time of his direct appeal, when the defaulted claims shoul have been raised. Our discussion of the 1981 date will demon strate the flaw in the State's reasoning.

[3] The Supreme Court of the United States has made clear that a state's procedural rule used to bar considerati of a claim "must have been 'firmly established and regularl followed' by the time as of which it is to be applied." *For v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Ken tucky*, 466 U.S. 341, 348 (1984)). In *NAACP v. Alabama e rel. Patterson*, 357 U.S. 449, 457 (1958), the Court refused t apply a state's procedural rule, because the defendant then could not be "deemed to have been apprised of its existence." In *Ford*, the Supreme Court said that applying the rule to For would "apply a rule unannounced at the time of [Ford's] tri . . . ." *Ford*, 498 U.S. at 424.

We have held that the proper time for determining whethe a procedural rule was firmly established and regularly fo lowed is "the time of [the] purported procedural default." *Calderon v. Bean*, 96 F.3d 1126, 1130 (9th Cir. 1996), *cert denied*, 117 S. Ct. 1569 (1997). Therefore, we examin whether the state courts were regularly and consistentl applying the relevant procedural default rule "at the time th claim should have been raised." *Calderon v. Hayes*, 103 F.3 72, 75 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2532 (1997)

[4] With respect to the *Dixon* rule, we have held that a relevant point of reference for assessing its application is the time at which the petitioner "had an opportunity to raise the claims on direct appeal." *Id. See also Bean*, 96 F.3d at 1131 (evaluating the *Dixon* rule "at the time Bean filed his direct appeal"). Because the *Dixon* rule precludes collateral review of a claim that could have been brought on direct appeal, the procedural default, though announced by the California Supreme Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been included for review. In this case, that moment is 1981, the year of Fields' direct appeal.

In addition to avoiding the unfairness of applying a new rule retroactively, the requirement that the rule be in existence at the time of the claimed default, the 1981 appeal in this case, also gives the defendant and his counsel notice that the claims must be raised at that time. A trigger date of 1994, when the default rule was actually applied by the California Supreme Court, would not insure that Fields and his counsel knew in 1981 that all claims had to be raised then or be held to be procedurally barred. The requirement of notice thus dooms the State's attempt to use 1994 as the trigger date. A consistently applied rule in 1994 could not cure a lack of notice in 1981.

Fields does not attempt to demonstrate the inconsistent application of the *Dixon* rule in 1981 by employing the traditional method of providing "a representative sample of cases in which the default was either invoked or, at least, where it arguably might have been applicable but was disregarded." *Fierro v. Calderon*, No. CV-94-3198-LGB, at 15 (C.D. Cal. June 12, 1996) (citing *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 263-64 & n.14 (1982)). Instead, Fields argues that the California Supreme Court's reevaluation of its procedural rules in the 1993 cases of *In re Harris*, 855 P.2d 391 (Cal. 1993), and *In re Clark*, 855 P.2d 729 (Cal. 1993), decided between Fields' direct

appeal and the California Supreme Court's denial of clev
claims in his habeas petition due to procedural default, esta
lishes that the *Dixon* rule was not regularly and consisten
applied at the time of his direct appeal. We therefore turn
the question, not previously decided in this circuit, wheth
the *Dixon* rule and the standards governing its applicati
were firmly established and consistently followed at the ti
of Fields' direct appeal in 1981.[4]

B. *The Adequacy of the Dixon Rule*

[5] Under the adequate and independent state grounds do
trine, federal courts "will not review a question of federal la
decided by a state court if the decision of that court rests
a state law ground that is independent of the federal questi
and adequate to support the judgment." *Coleman v. Thom*

[4]In previous cases, we have avoided the resolution of this issue. S
Hayes, 103 F.3d at 75 (noting that "[w]hether the *Dixon* rule was su
ciently clear and consistently applied before *Harris* is open to so
question," but declining to decide the question, holding, in a petition
writ of mandamus, that the district court's conclusion that the *Dixon* r
was inadequate to bar review was not clearly erroneous); *Bean*, 96 F.
at 1131 (noting that "[w]hether the *Dixon* rule was sufficiently clear a
consistently applied at the time Bean filed his direct appeal [in 1981]
open to some question," but holding that "[w]e need not resolve the iss
here . . . since the California Supreme Court's order provides no ba
upon which to apply the *Dixon* rule, if adequate, to Bean's claims.").

There is a conflict in the federal district courts in California as
whether the *Dixon* rule is adequate to bar federal habeas review
defaulted claims. *See, e.g., Fierro v. Calderon*, No. CV-94-3198-LGB,
16 (C.D. Cal. June 12, 1996) (ruling that "the California Supreme Cour
recent reevaluation of its procedural rules [in *Harris* and *Clark*] all h
establishes that the *Dixon* rule is not adequate"); *Deere v. Calderon*, 8
F. Supp. 893, 901 (C.D. Cal. 1995) (noting that the *Dixon* rule had exist
for forty years and ruling that "[p]etitioner has not offered the Court a
compelling justification for disregarding the state court denial of the eig
claims on the additional ground that they could have and should have be
raised in petitioner's direct appeal"); *Odle v. Calderon*, 884 F. Supp. 140
1413 (N.D. Cal. 1995) (concluding that "the *Dixon* procedural rule has n
been uniformly and regularly applied by the California Supreme Court

son, 501 U.S. 722, 729 (1991). "[T]he procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994). The procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

[6] Not all state procedural bars are adequate to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells*, 28 F.3d at 1010 (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991)). *See also Morales*, 85 F.3d at 1390 ("Nor can a state preclude federal review by invoking procedural rules that the state does not apply consistently."). "The reason for these requirements . . . is that it is grossly unfair—and serves none of the purposes of respect for procedural rules—to forfeit an individual's constitutional claim because he failed to follow a rule that was not firmly established at the time in question." *Bean*, 96 F.3d at 1129 (quotations and citations omitted).

The mere fact that a state's procedural rule includes an element of discretion does not render it inadequate. *Morales*, 85 F.3d at 1392. We have held:

> It is true . . . that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. . . . [J]udicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits.

Id. So long as standards governing the exercise of discreti are firmly established and are consistently applied, a stat procedural rule will be adequate to bar federal claims.

[7] *In re Harris*, 855 P.2d 391 (Cal. 1993), involved habeas petitioner who was attempting to assert a claim habeas that had previously been heard and decided on dir appeal. California's procedural rule that generally prevent petitioner from raising a claim for habeas review that was p viously heard and decided on direct appeal is known as *Waltreus* rule, derived from *In re Waltreus*, 397 P.2d 1 (Cal. 1965).[5] Although *In re Harris* directly involved application of the *Waltreus* rule, the California Supre Court made clear that "[m]uch of the following discuss also applies to the so-called '*Dixon* rule,' which gener prohibits raising an issue in a postappeal habeas corpus p tion when that issue was not, but could have been, raised appeal." *In re Harris*, 855 P.2d at 395 n.3.

The *In re Harris* court began its discussion by noting it has long been the rule in California that "habeas corpus not lie ordinarily as a substitute for an appeal nor as a sec appeal." *Id.* at 396. However, because

> multiple repetitions [of the rule] over time may tend to obscure the original purpose of the rule[.] . . . [and] large number[s] of petitions for writs of habeas corpus [are] filed in the courts of this state[,] the concomitant burden on the judiciary to evaluate the hundreds of petitions ultimately barred on procedural grounds [makes] it . . . important to reexamine and reiterate the purpose of the *Waltreus* rule.

Id. (citations and footnote omitted).

[5]We note that a claim barred from further state court review b *Waltreus* rule would not be barred from review in federal habeas. would be an exhausted claim.

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PUBLISHER'S NOTE:

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intervening judicial decision). *See id.* at 398-407. This extensive discussion would not have been necessary if the California Supreme Court had regularly and consistently applied the *Dixon* and *Waltreus* rules in previous cases. Instead, it is evident that, over the years, a number of situations developed that compelled the court to create exceptions to these rules in the effort to better formulate the "proper balance" between finality and justice in habeas review. Because the California Supreme Court explicitly acknowledged that its application of the *Waltreus* and *Dixon* rules had become obscured over the years by the development of a number of exceptions, requiring the court to provide "needed guidance to the bench and bar" regarding the application of these rules, we conclude that the *Dixon* rule is not an adequate state ground to bar federal habeas review of Fields' defaulted claims.

[9] Our conclusion is strengthened by the California Supreme Court's opinion in *In re Clark*, 855 P.2d 729 (Cal. 1993), decided the same day as *In re Harris*. *In re Clark* involved the application of the procedural rules regarding the timeliness of habeas petitions and the doctrine of separate petitions, barring a petitioner from raising claims in a second habeas petition that could have been, but were not, raised in the first habeas petition. The court began its analysis with a general discussion of the historical development and application of the state's habeas procedural rules and the relevant exceptions. Though the court in *In re Clark* specifically declined to "clarify and limit the exceptions to the rules of *In re Waltreus* . . . and *In re Dixon*" because that question was to be decided in *In re Harris*, the court clearly intended its general discussion of California's habeas procedural rules to encompass the *Dixon* and *Waltreus* rules. *Id.* at 737-40, 741 n.8.

[10] At the outset of its general analysis, the court explained:

> Before considering the possible merit of any claim, it is therefore appropriate to review the deci-

> sional and statutory law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus. *In addition, because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted.*

Id. at 737 (emphasis added). Later in the discussion, the co held:

> Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious petitions are *subject to undefined exceptions* and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.

Id. at 740 (emphasis added). The California Supreme C could hardly have stated more clearly that the applicatio its procedural rules governing habeas petitions had bec irregular and inconsistent. The opinions in *In re Clark* an *re Harris* were intended to reestablish California's proced rules governing state habeas petitions and clearly define limit the applicable exceptions.

[11] These decisions from the California Supreme Cou 1993, though certainly instructive on the question of the quacy of the *Dixon* rule, do not answer the question of ex *when* the *Dixon* rule and other rules had become irregular inconsistently applied. As we noted earlier, Fields did not vide us with a survey of cases to demonstrate the inconsi application of the *Dixon* rule in *1981*, the time of his d appeal.

[12] However, we have conducted our own survey of fornia cases decided in the nine years preceding and inclu Fields' appeal (1973-1981). *See Johnson v. Mississippi*, U.S. 578 (1988) (wherein the Supreme Court undertoo own survey of state court cases to determine the adequac

a procedural bar). We note in passing that during those years, habeas petitions were initially filed in California Superior Court with rights of appeal to both the California Court of Appeal and the California Supreme Court. Therefore, published decisions from both of California's appellate courts are instructive as to how the *Dixon* rule was being applied. After we eliminated the cases that cited the *Dixon* rule, but did not actually involve the possibility of the rule's application, we were left with nine cases.[7]

The *Dixon* case itself involved a claimed denial of constitutional rights (an unlawful search and seizure and a coerced confession), and the rule that emerged from *Dixon* originally applied to such claims. "The same principles should apply even though the alleged errors involving factual issues relate to an asserted denial of constitutional rights." *Dixon*, 264 P.2d at 515.

[13] As the nine cases from 1973 to 1981 demonstrate, however, consideration of constitutional claims not raised on direct appeal had become the norm, even in cases where the *Dixon* rule was clearly applicable. In only two cases (*Jones* and *In re Ronald E.*), was the *Dixon* rule specifically applied to bar review of an issue. In one other case (*In re Brown*), the court stated the *Dixon* rule, and then construed the habeas petition as one for mandamus. In the other cases, the rule was not applied to block consideration of the defaulted issue. *See, e.g., In re Walker*, 518 P.2d at 1134 (assuming special circumstances exist in order to avoid the *Dixon* rule and reach the merits of the petition).

---

[7] *In re Walker*, 518 P.2d 1129 (Cal. 1974) (In Bank); *In re Brown*, 511 P.2d 1153 (Cal. 1973) (In Bank); *People v. Jones*, 510 P.2d 705 (Cal. 1973) (In Bank); *People v. Vaughn*, 508 P.2d 318 (Cal. 1973) (In Bank); *In re Fuller*, 177 Cal. Rptr. 233 (Cal. Ct. App. 1981); *In re Watson*, 154 Cal. Rptr. 151 (Cal. Ct. App. 1979); *In re Ronald E.*, 132 Cal. Rptr. 1 (Cal. Ct. App. 1976); *In re Duran*, 113 Cal. Rptr. 442 (Cal. Ct. App. 1974); *In re Young*, 107 Cal. Rptr. 915 (Cal. Ct. App. 1973).

The *Fuller* case perhaps best represents the lack of ance the *Dixon* rule was providing by 1981. The Cou Appeal said:

> We shall determine the case on the merits. It is true that as a general rule habeas corpus cannot serve as a substitute for appeal. (*In re Dixon* (1953 41 Cal.2d 756, 759, 264 P.2d 513.) The rule yields however, in special circumstances; courts do not always require the exhaustion of appellate remedies. (Ibid.; *In re Black* (1967) 66 Cal.2d 881, 887, 59 Cal.Rptr. 429, 428 P.2d 293; see Witkin, Cal.Criminal Procedure (1963) *Habeas Corpus and Other Extraordinary Writs*, § 797, p. 769.) Here, as in *In re Black*, *supra*, petitioner's continued confinement followed "somewhat unique" developments and the issue he presents is jurisdictional. It is also apparently novel. We are thus *disposed* to consider it.

In re Fuller, 177 Cal. Rptr. 233, 235-36 (Cal. Ct. App. (emphasis added).

The flexible application of the *Dixon* rule was also cl illustrated in *Duran*:

> The Attorney General points out Duran has a remedy through his appeal from the order revoking probation, and moves to dismiss the petition on that basis. While ordinarily habeas corpus is not a substitute for appeal (*In re Dixon*, 41 Cal.2d 756, 264 P.2d 513), this Court has discretion to issue the writ if it believes an appeal is not adequate, or if a prompt disposition is required in the interests of justice. (*In re Baird*, 150 Cal.App.2d 561, 563, 310 P.2d 454; Witkin, Calif.Crim.Proc., p. 770). This is such a case.

In re Duran, 113 Cal. Rptr. 442, 444 (Cal. Ct. App. 19

[14] The California Supreme Court's 1993 decisions in *In re Harris* and *In re Clark*, combined with our independent survey of California case law for most of the decade preceding Fields' direct appeal in 1981, convince us that the *Dixon* rule is not an adequate state ground to bar federal review of Fields' defaulted claims.

CONCLUSION

For the foregoing reasons, the district court's order dismissing claims VII (A, B, E, F, G), VIII (B, C, F, G, H, I), XIII, XVI, XIX, XXI, XXII, XXIII, XXIV, XXVIII, and XXIX contained in Fields' petition for writ of habeas corpus is VACATED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

ENTERED
CLERK, U S DISTRICT COURT
JUN 12 1996
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED
JUN 10 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVIE LAMAR FIELDS, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison State Prison at San Quentin, Respondent.	CASE NO. CV 92-0465 DT ORDER RE RESPONDENT'S MOTION TO DISMISS CLAIMS BARRED BY STATE PROCEDURAL DEFAULT

Background

1. Factual Summary

In 1978, within two weeks of being released from prison on a manslaughter charge, petitioner embarked on a "one-man crime wave." He kidnaped a young woman and forced her to write him a check from her bank account. Petitioner accused the victim of not giving him a check from her bank account. Petitioner accused the

victim of not giving him all her money and killed her for trying to "run a game on him."

Approximately one week later, petitioner and an accomplice kidnapped, robbed, assaulted and raped two prostitutes. Petitioner then released the victims. A few hours later, petitioner and his accomplice kidnaped a college student. Petitioner robbed and raped the girl, then eventually released her.

Petitioner was convicted in 1979 of the robbery-murder of Rosemary Cobb and of three counts of robbery, three counts of kidnaping, three counts of forcible oral copulation, two counts of rape and one count of assault with a deadly weapon. The jury found true the special circumstance of premeditated murder in the course of a robbery.

At the penalty phase, the parties stipulated that petitioner had previously been convicted of manslaughter after killing a man with a dumbbell bar. The prosecution introduced a photograph of the manslaughter victim's body. Petitioner presented no evidence. The jury sentenced him to death.

1. Procedural History

Petitioner's conviction and sentence were affirmed on direct appeal. People v. Fields, 35 Cal.3d 329 (1983). In 1984, Fields filed a petition for writ of habeas corpus in the state supreme court. After a referee hearing on the limited issue of whether Fields' trial counsel's performance was deficient, the California Supreme Court denied the petition in 1990, holding that petitioner suffered no prejudice from trial counsel's alleged incompetence. In re Fields, 51 Cal.3d 1063 (1990).

In 1993, Fields filed a federal habeas petition. The federal petition was found to contain unexhausted claims, and petitioner was sent back to state court for exhaustion. In 1994, he filed a second state habeas

petition presenting the unexhausted claims to California Supreme Court. On October 14, 1994, the court issued a postcard denial of the state habeas petition. All but two of the claims presented were denied on procedural grounds.

Petitioner filed an amended federal petition on March 21, 1995. On July 31, 1995, respondent filed a Motion to Dismiss Claims Barred by State Procedural Default which is presently before this Court.

Petitioner filed an opposition to the motion on August 28; the state filed its reply on September 5. Further briefing was ordered on January 22, 1996, and was submitted by respondent and petitioner on January 25 and February 1, respectively.

Discussion

1. Standard

A. Assessing the Adequacy of a State Procedural Default

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prison can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). This doctrine is based on considerations of federalism and comity. See Michigan v. Long, 463 U.S. 1032, 1040 (1983).

For a state procedural rule to be adequate, it must be "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988). The state rule need not be followed in every case where the bar is applicable. There is room for exceptions and the occasional exercise

of mercy. However, the rule must, at a minimum, be applied in the "vast majority of the cases." Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).

As a corollary to the requirement of strict application, a state procedural rule is not adequate if it "appears to be discretionary." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). "A state may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing on kindred issues raised in the same manner." Williams v. Georgia, 349 U.S. 375, 383 (1955). Procedural defaults that are discretionary "cannot act as a bar to federal review." Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

The procedural rule must also have been firmly established at the time of the alleged default. "If the petitioner's failure to raise a claim did not violate any then-existing rule, he did not commit a procedural default." English v. United States, 42 F.3d 473, 478 (9th Cir. 1994). "Where there is reason for confusion or uncertainty with respect to state procedures, a procedural default will be inadequate to bar federal habeas relief." Harmon, 959 F.2d at 1462.

B. A Claim That is Otherwise Procedurally Barred May Be Reviewed on the Merits Upon a Showing of Cause and Prejudice or a Fundamental Miscarriage of Justice.

If a claim is found to be procedurally barred by an adequate and independent state law rule, in appropriate circumstances, a federal court may still review the merits of a defaulted claim. "The doctrine of procedural default is based on comity, not jurisdiction, and the federal courts retain the power to consider the merits of procedurally defaulted claims." Harmon, 959 F.2d at 1461. However, petitioner must "show cause for the default and prejudice attributable thereto, or demonstrate

that the failure to consider the federal claim will result in a fundamental miscarriage of justice." Harris v. Reed, 489 U.S. 255, 262 (1988) (internal quotations omitted).

The existence of "cause" for a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

2. Application of Doctrine of Procedural Bar to the Instant Case

A. The Procedural Defaults Expressed in *In re Dixon* and *In re Harris* are Applicable.

The California Supreme Court issued a postcard denial of Fields' second state habeas petition on October 14, 1994. The state court denied 20 claims and subclaims on the "procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition." The court then cited In re Harris, 5 Cal.4th at 829, and In re Dixon, 41 Cal.2d at 759, in support of the denial.

Respondent, in support of his motion to dismiss, asserts that the state habeas claims were untimely and thus were denied based on the rule expressed in In re Clark, 5 Cal.4th at 756, that a petitioner must "explain and justify any significant delay in seeking habeas corpus relief." However, the mere existence of a basis for a state procedural bar does not deprive a federal court of jurisdiction, "the state court must actually have relied on the procedural basis for its disposition of the case." Caldwell v. Mississippi, 472 U.S. 320, 326 (1985). A federal habeas court may review a claim on the merits unless the state court made a "clear and express" statement that it relied upon procedural grounds.

Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (citing Thomas v. Lewis, 945 F.2d 1119, 1122-23 (9th Cir. 1991). The California Supreme Court clearly relied on the rules expressed in Harris and Dixon. The fact that another procedural default rule may have been available -- but not applied -- cannot be used to bar federal review. Caldwell v. Mississippi, 472 U.S. 320, 326-28 (1985). Therefore, the analysis of the instant motion is focused on whether the procedural bar rules from Harris and Dixon act to bar federal review of the claims identified by respondent.

B. At the Time Petitioner Defaulted on his State Court Claims, the *Dixon* Rule Was Regularly and Consistently Applied

In 1953, the California Supreme Court decided In re Dixon, 41 Cal.2d 756 (1953). The court held that, "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." Id. at 759. Other California courts followed this rule for 40 years. See In re Shipp, 62 Cal.2d 547, 552 (1965); In re Black, 66 Cal.2d 881, 887 (1967); In re Terry, 4 Cal.3d 911, 923 (1971); In re Walker, 10 Cal.3d 764 (1974); In re Bower, 38 Cal.3d 865, 872 (1985).

In 1993, the California Supreme Court recognized the continuing vitality of the Dixon rule in its decision in In re Harris, 5 Cal. 4th at 829. In Harris, the court reiterated the rule set forth in Dixon and stated that "an unjustified failure to present an issue on appeal will generally preclude its consideration in a post-conviction petition for writ of habeas corpus." Id. at 829.

Petitioner argues that the fact that the California courts have sometimes reviewed claims brought in a state

habeas petition that could have been raised on direct appeal renders the Dixon rule discretionary. However, the cases in which the state courts have reviewed claims on habeas that could have been raised on direct appeal have done so because the petitioner made a showing of "special circumstances" that constituted an excuse for the failure to bring them on appeal. See e.g. In re Wallace, 3 Cal.3d 289, 292 (1970); In re Black, 66 Cal.2d at 887. The fact that the state court did not review petitioner's claims is evidence that he did not raise the type of special circumstances that will convince the state court to overlook a Dixon violation. This Court will not second-guess the state court in the application of its own rules. Absent a showing of special circumstances, Dixon will bar claims that could have been, but were not, brought on direct appeal. This rule was regularly and consistently applied at the time of the default.

Other federal courts have come to this same conclusion. In Deere, 890 F.Supp at 901, the district court found that the rule stated that the Harris/Dixon bar was a valid procedural default. The facts of Deere are very similar to the facts of Fields' case. In Deere, the petitioner's conviction and sentence were affirmed on direct appeal in 1991. He filed his first state habeas petition in January 1991; it was denied in June 1991. Deere then filed a federal habeas petition which contained unexhausted claims. Deere was sent back to state court to exhaust the claims. He filed a second state habeas petition in December 1993 which was denied on the grounds of untimeliness and because the claims could have been, but were not, raised on appeal. Deere, 890 F.Supp 895-96. The district court found that the state court's ruling on the second state habeas petition acted as a procedural bar to federal review of Deere's claims.

The rule in California that claims that could be brought on direct appeal would not, absent special circumstances, be cognizable on habeas review has been

in existence for 40 years. The continuing vitality of this rule was affirmed by the California Supreme Court in 1993. The Dixon rule was firmly established both at the time petitioner filed his second habeas petition and at the time of his direct appeal. Petitioner was presumptively aware of the Dixon rule when he briefed the issues to be presented on direct appeal. Insofar as the Dixon rule was "in existence at the time of the alleged default," English, 42 F.3d at 478 (emphasis in original), it can serve as "the sort of firmly established and regularly followed state practice that can prevent implementation of federal rights." James, 466 U.S. at 348.

For the reasons stated in this Order, respondent's Motion to Dismiss Claims Barred by State Procedural Default is GRANTED and claims VII (A,B,E,F,G), VIII (B,C,F,G,H,I), XIII, XVI, XIX, XXI, XXII, XXIII, XXIV, XXVIII and XXIX are dismissed.

Petitioner shall file a brief within 15 days of the date of this order showing cause for the default and prejudice attributable thereto, or demonstrating that the failure to consider the federal claim will result in a fundamental miscarriage of justice. Respondent shall file a responsive brief within 15 days of the filing of petitioner's brief and petitioner shall file a reply within 15 days of the filing of respondent's brief.

IT IS SO ORDERED.

Dated: June 10, 1996.

DICKRAN TEVRIZIAN

Dickran Tevrizian
United States District Judge

APPENDIX C

SUPREME COURT
FILED
OCT 14 1994
ROBERT WANDRUFF Clerk
Deputy

No. S037370

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE STEVIE LAMAR FIELDS
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Parts I through VII, and XXXIII, of the petition comprise statements of the procedural and factual posture of the case and do not set forth separate claims by petitioner.

The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition: the claims set forth in parts IX (A, B, E, F, G), X (B, C, F, G, H, I); XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXXI. (In re Harris (1993) 5 Cal.4th 813, 829; In re Dixon (1953) 41 Cal.2d 756, 759.)

The following claims are denied on the procedural ground they previously were raised and rejected on appeal or in the first habeas corpus petition: the claims set forth in parts IX (C, D), X (A, D, E), XI, XII, XIII, XIV, XVI, XVII, XIX, XX, XXI (with the exception of the claim relating to the instruction on suppression of evidence), XXII, XXVII, XXVIII, XXIX. (In re Harris, supra, 5 Cal.4th 813, 825; In re Waltreus (1965) 62 Cal.2d 218, 225.)

The claims set forth in parts VIII (A, B, C, D, E, F, G, H, I) and XXXII, are denied on the merits.

Mosk, J., is of the opinion an order to show cause should issue.

Kennard

Acting Chief Justice

APPENDIX D

FILED
DEC 30 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)
	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Extend the Stay of Mandate" is GRANTED. The mandate is stayed through January 27, 1998.

FILED
DEC 1 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Extend the Stay of Mandate is GRANTED. The mandate is stayed through December 28, 1997.

FILED
OCT 29 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON, Warden,	)
	)
Respondent-Appellee.	)
	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Recall and Stay the Mandate" is DENIED as moot as to Appellee's request to recall the mandate. Appellee's request to stay the mandate pending a petition for a writ of certiorari to the Supreme Court is GRANTED, in part. The mandate is stayed for thirty days from the date of this order unless further extended for cause shown. Rule 41(b), F.R.A.P.

FILED
OCT 29 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) AMENDED ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)
	)

Before: PREGERSON, WIGGINS, and T.G. NELSON, Circuit Judges.

Appellee's Petition for Rehearing is DENIED.

FILED
OCT - 7 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-80292
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON, Warden,	)
	)
Respondent-Appellee.	)
	)

Before: PREGERSON, WIGGINS, and T.G. NELSON, Circuit Judges.

Appellee's Petition for Rehearing is DENIED.

APPENDIX E

Part 6

Former §2254, State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal Court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) That the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly supported such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal Court proceeding.